STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v	No. 262329 St. Clair Circuit Court
JOHNNY KEVIN LEE, Defendant-Appellant.	LC No. 04-002014-FC

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and sentenced as a fourth habitual offender, MCL 769.12, to serve a term of 25 to 40 years' imprisonment. Defendant appeals as of right. We affirm.

I. Effective Assistance of Counsel

Defendant first argues defense counsel was constitutionally ineffective in failing to seek a competency evaluation. We disagree. Because an evidentiary hearing on defendant's claims of ineffective assistance has not been held, our review is limited to mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether the facts in the record suggest that defendant was deprived of his right to the effective assistance of counsel presents a question of constitutional law that we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To overcome this presumption, defendant must show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. *Id.*; *Rodgers*, *supra*.

A defendant is entitled to a competency evaluation when evidence demonstrates a "bona fide doubt" as to his capacity to stand trial. See *People v Johnson*, 58 Mich App 473, 475; 228 NW2d 429 (1975). Here, while awaiting trial in this matter defendant was involved in an altercation during which he sustained a skull fracture requiring surgery. However,

notwithstanding the physical severity of this injury, the record reveals no evidence that defendant's mental competency was ever in question during his four-day stay in the hospital in December 2004, or at any other time before or during the trial held between February 23 and 25, 2005. Defendant was sentenced on April 11, 2005. On April 22, 2005, Dr. Aleksandra Wilanowski of the Michigan Department of Corrections (MDOC) reviewed defendant in a special needs identification screening and noted in a report that defendant "has mental limitation (dementia) due to traumatic brain injury, needs special assistance in reading, responding to orders and activities of daily living." On appeal, defendant points to the MDOC screening report as evidence of his mental incompetence. However, this report was not drafted until after defendant was tried and sentenced, and nothing in the trial record indicates that defense counsel was aware of the possibility of any mental incompetence at the time of trial. Without a showing that facts were brought to defense counsel's attention that raised a "bona fide doubt" with respect to defendant's mental competence, and that defense counsel ignored or otherwise failed to act upon these facts, it cannot be said that counsel's performance fell below an objective standard of reasonableness. *Johnson*, *supra*; *Effinger*, *supra*. Defense counsel's failure to raise the issue of competence did not, therefore, deprive defendant of the effective assistance of counsel. Further, defendant has made no showing that at the time of trial he was incapable, because of his mental condition, of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. In fact, the record shows otherwise.

Defendant next argues that defense counsel was constitutionally ineffective for having elicited evidence that defendant had previously been convicted of criminal sexual conduct and that this conviction resulted from a plea of guilty. Again, we disagree.

Even assuming that counsel's performance in this regard was deficient, the record does not support that defendant was prejudiced by the error. Defendant moved before trial to suppress any evidence of the acts leading to his prior conviction. The trial court, however, denied the motion and permitted reference to the incident under MRE 404(b). Testimony describing the events leading to the prior conviction was thus relayed to the jury through testimony offered by the victim of the prior offense. Although the jury would not have known how the matter was resolved absent counsel's elicitation of evidence regarding the plea conviction, the victim's testimony was sufficiently strong evidence of defendant's guilt of the bad act that the mere fact that defendant was convicted of the offense by plea is insufficient to support a reasonable probability that, but for elicitation of those facts, the outcome of the proceeding would have been different. Furthermore, we note that in answer to the prosecution's objection to counsel's elicitation of this evidence, the trial court struck the questioning and instructed the jury that it could not use that information in deliberating defendant's guilt or innocence of the instant offense. The jury is presumed to have followed this instruction, see *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), which was repeated by the court at the close of trial. Defendant has thus failed to show the prejudice necessary to support that he was denied the effective assistance of counsel on this ground. *Id*. at 58-59; *Effinger*, *supra*.

Defendant further argues defense counsel was constitutionally ineffective in failing to object to the detective in charge of the case giving opinion testimony as to defendant's guilt by stating that the victim was honest and that her injuries were consistent with a sexual assault. We disagree.

Although it is improper for a witness to comment on the credibility of another witness, *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985), or to express an opinion on the defendant's guilt or innocence of the charged offense, *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985), a police officer may provide lay opinion testimony regarding topics within his or her personal knowledge and experience, *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988). Here, when asked on direct examination to describe the victim's behavior during her initial interview by the police, Detective Elaine Butts stated:

> [W]hen you wanted to hit on some details, [the victim] kind of would shut down, which is not un-normal for a sexual assault victim. She had kind of shut down and didn't want to talk about things. She couldn't remember a lot of detail, which is not uncommon when something traumatic happens to a person. She just would only tell us the basics and then shut down and, and start to cry.

Detective Butts also stated that the victim "had bruises on her legs which were consistent with a forceful sexual assault," and that "[i]f I wouldn't have seen that I would have had a little problem with what she was telling me, but being that was there it was consistent with struggling and somebody forcing her legs open." Additionally, with respect to a scratch on the victim's face, Detective Butts testified that the victim "told me it was from the glasses . . . [s]o I believed her."

Detective Butts' comments that the bruises were consistent with an assault were neither opinions on the veracity of the victim's testimony nor opinions on defendant's guilt. Rather, Detective Butts was properly expressing her lay opinion regarding the source of the injuries in light of her training and experience as a police officer specializing in sexual assault investigations. In addition, Detective Butts' comment that she believed the victim when she told her the scratch on her face was caused by her glasses was not equivalent to stating the victim is an honest and credible witness. Rather, Detective Butts was simply stating that she had no reason to doubt the victim's statement regarding the cause of the scrape.

Similarly, we do not find Detective Butts' statement that the victim "has never lied to me on anything that I've dealt with her on," to be improper opinion testimony warranting reversal. In making this statement, Detective Butts was not attempting, in an isolated context, to express her opinion on the victim's credibility, but rather, in response to questioning by defense counsel, was obliquely commenting that the victim's credibility played no part in the four-month delay between her reporting of the crime and Butts' forwarding of that information to the prosecutor. Given the context and substance of the statement, defense counsel's failure to object was not objectively unreasonable and, therefore, did not deprive defendant of the effective assistance of counsel. *Effinger*, *supra*.

II. Admission of Evidence of Defendant's Prior Bad Act

Defendant next argues the trial court erred when it allowed evidence of his prior bad act because that evidence did not show a common scheme, was not relevant to the charged offense, and was unfairly prejudicial. We disagree. A trial court's decision to admit other acts evidence is reviewed for an abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

MRE 404(b) permits the admission of "[e]vidence of similar misconduct . . . to show that the charged act occurred when the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Ackerman*, 257 Mich App 434, 440; 669 NW2d 818 (2003). In the instant case, the prior victim's testimony shows a common scheme or plan sufficient to render the evidence admissible under MRE 404(b). Although the events appear to be isolated, "relevant similar acts are not limited to circumstances in which the charged and uncharged acts 'are part of a single continuing conception or plot.'" *Ackerman*, *supra* at 440, quoting *People v Sabin*, 463 Mich 43, 64; 614 NW2d 888 (2000). Given the many similarities in defendant's approach and tactics, the evidence at issue here indicates "the existence of a plan rather than a series of similar spontaneous acts." *Ackerman*, *supra* at 440-441 (citation and internal quotation marks omitted). Indeed, the complainant testified that defendant confronted her, demanded sex, and punched her in the face when she told him "No." He then forcibly got on top of her, pulled down her pants and attempted sexual intercourse. Finally, he threatened her, telling her that if she went to the police he would come back and "blow up" her house. The prior victim likewise testified that she awoke with defendant on top of her, requesting sex. When she declined and attempted to push him off, defendant punched her in the face, pulled down her pants, and had forcible intercourse with her. He then told her if she went to the police he would kill her.

In both cases, the victims were subjected to physical violence—in particular a punch in the face—after defendant demanded but was denied sexual intercourse. Defendant then laid on top of each victim then ripped down her pants. Finally, after completing or attempting to complete the sexual assault, they were each threatened by defendant with death or other serious harm if they revealed the incident to the police. Although defendant's tactics for accomplishing his goal of sexual assault were not particularly creative, "[t]he plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." *Id*. (Citation and internal quotation marks omitted). In both cases, defendant used the same tactics to disable his victim and coerce her silence about the assault. Thus, the evidence at issue was properly offered for, and relevant to show, a common plan or scheme.

Finally, although relevant evidence may be excluded under MRE 403 when the danger of unfair prejudice substantially outweighs its probative value, it is well settled that such "prejudice means more than simply damage to the opponent's case." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). "A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion." *Id*. Rather, prejudice in this context means "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *Id*. In this case, although the potential for prejudice existed, the evidence was highly probative in showing a common plan or scheme used by defendant to sexually assault the victims and consequently, that the act alleged by the victim in this case in fact occurred. Given this probative weight, that defendant's case may have been damaged by this evidence cannot be grounds for exclusion on the basis of unfair prejudice. The fact of the previous act, executed in nearly the same manner, makes the disputed fact of the current act more likely. The trial court did not abuse its discretion in determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra